EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY

THE hesitation, if not downright refusal, of American law to allow preventive remedies in order to secure interests of personality, where redress by way of damages is often obviously inadequate or even wholly inapplicable, has frequently been criticised.[1] Reading the American cases on this point, one may recall the words of Mr. Justice Holmes upon the subject of trespass *ab initio:*

"It is revolting to have no better reason for a rule of law than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past." [2]

As he says, in the same address:

"It does not follow because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. . . . A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." [3]

If the legal remedy for breach of a contract is inadequate to secure to the promisee his interest in a promised advantage which the law recognizes, he may have specific reparation in equity. If a tort results in injury to property for which the legal remedy of damages is wholly inadequate and the equitable remedy is practicable, the owner may have specific redress by restoration of the *status quo.* If a threatened tort involves injury to property for which the legal remedy is inadequate, making some allowance for difficulties as to

[1] See, *e. g.*, ABBOT, JUSTICE AND THE MODERN LAW, 32.

[2] The Path of the Law, 10 HARV. L. REV. 457, 469.

[3] *Id.*, 468.

establishment of title at law, growing largely out of the unsatisfactory character of the old mode of trial in equity, we may say fairly that preventive relief is now normally available. But if an injury to personality is threatened, wholly destructive of plaintiff's dearest interests, we are told that his only recourse is the legal remedy of damages although no pecuniary measure can possibly be applied to the interest and no pecuniary standard to the wrong. May we give any reasons other than purely historical for a doctrine which at first blush is so arbitrary and unjust? Do the rules which our books still announce upon this subject rest upon any basis more legitimate than unintelligent adherence to the *dicta* of a great judge in the pioneer case? May we put this corner of the law in the order of reason by making the rules thereof conform to the general principle of concurrent jurisdiction where the legal remedy for a legal right is inadequate or by showing sound reason why, in this one spot, that general principle should not obtain?

Three classes of cases have raised these questions recently: (1) Cases where injunctions were sought against defamation or disparagement of property, (2) cases where equity jurisdiction was invoked against injuries to privacy or to the domestic relations, and (3) cases of unlawful interference with social and political relations where the significant wrong was injury to feelings, sensibilities, and honor. Each of these classes involves peculiar difficulties. Hence it will be convenient to take them up separately.

I

Defamation and Disparagement of Property

Defamation has a two-fold aspect. On the one hand it may be an injury to personality affecting the feelings, the sensibilities, the honor of the person defamed. On the other hand it may be an injury to substance, since credit plays so large a part in society that the confidence of one's fellows may be a valuable asset. Elsewhere I have tried to show the importance of distinguishing the two interests which are secured by the legal right of reputation.[4] Such a distinction, strictly pursued, would preclude consideration of equitable relief against disparagement of property[5] in the present

[4] Interests of Personality, 28 Harv. L. Rev. 445, 447.

[5] This is Bower's phrase for what we have been wont to call "slander of title." Code of Actionable Defamation, 240, 241. It is to be preferred, since without disparaging

connection. But difficulties with respect to equitable relief against writing and publishing apply equally to each, and in the actual development of the subject in the cases other points have been of such controlling importance as to justify if not to compel departure from the logical scheme.

Using defamation, for the moment, to include disparagement of property, five questions have arisen with respect to the powers of a court of equity: (1) Has a court of equity jurisdiction to protect rights of personality or is its jurisdiction confined to securing rights of property? (2) If only rights of property may be protected, what is meant by property in this connection? Is the term used in a broad sense to signify interests of substance as distinguished from interests of personality? (3) Is relief by injunction against libel or published disparagement of property precluded by common-law policy or constitutional provision as to freedom of the press? (4) Does common-law policy as to jury trial or Fox's Libel Act as declaratory thereof require an issue as to the truth of a publication to be tried to a jury? (5) Whatever the general principles of equity jurisdiction may require, is the matter foreclosed for practical purposes by a settled current of authority against injunctions in these cases?

All discussion of these questions runs back to the famous case of *Gee* v. *Pritchard*.[6] In that case defendant had been brought up in the family of the plaintiff's late husband and had been educated as an adopted son. Being dissatisfied with the provision made for him on the death of plaintiff's husband, he threatened to publish letters which the plaintiff had written to him as to a member of the family. The cause came before Lord Eldon on motion to dissolve an interlocutory injunction against such publication. In the course of a colloquy with counsel at the hearing, Lord Eldon said that equity would not enjoin publication of a libel because such publication was a crime and equity had no jurisdiction to prevent crimes; that the case could not be maintained on the ground of protecting plaintiff's feelings or securing any other interest of personality, and that relief could only be rested on protection of rights of property. Afterwards he denied the motion to dissolve and continued the injunction in force on the ground that the plaintiff had a "sufficient

the title to property one may seriously injure another by disparaging the property itself.

[6] 2 Swanst. 402.

property in the original letters to authorize an injunction unless she has by some act deprived herself of it." [7]

Had it not been repeated many times [8] Lord Eldon's first proposition would hardly appear to require consideration. No one would assert that equity has jurisdiction to prevent crimes as such. But equity is not precluded from preventing irreparable injury through a civil wrong because the act, in another aspect, may be the subject of a criminal prosecution.[9] Indeed the very court which cites Lord Eldon's *dictum*, repeated by Lord Campbell, as a ground for refusing an injunction against disparagement of title, has settled the point in a long line of decisions.[10] We must remember that in 1818 the jurisdiction of equity to enjoin trespasses on land was not yet well developed and the whole subject of equity jurisdiction over torts was backward because of the unsatisfactory mode of trial.

It will have been perceived that the real injury in *Gee* v. *Pritchard* was an invasion of the right of privacy. In result therefore, a case in which we are told that equity has no jurisdiction to secure interests of personality, and the case always cited since for that proposition, was a pioneer decision finding a way for securing the then unknown right of privacy.[11] Characteristically, Lord Eldon's language was cautious, but his action was bold. As in *Lane* v. *Newdigate*[12] he did not strike down a historical prejudice which stood in

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[7] 2 Swanst. 424.

[8] *E. g.*, by Lord Campbell in Emperor of Austria *v.* Day, 3 DeG. F. & J. 217, 238–41, relied upon in Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69.

[9] Springhead Co. *v.* Riley, 6 Eq. 551; Atty. Gen. *v.* Terry, 9 Ch. App. 423, 431; Atty. Gen. *v.* Heatley (1897), 1 Ch. 560; *In re* Debs, 158 U. S. 564, 593; Beck *v.* Teamsters' Union, 118 Mich. 497, 526, 77 N. W. 13; Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106. Lord Eldon himself saw this. In the very sentence under discussion he adds: "excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime, — an exception arising from that peculiar jurisdiction of this court." In other words, when equity has jurisdiction apart from any question of a crime, its jurisdiction is not defeated by the circumstance that the act might also be the subject of a prosecution.

[10] See Vegelahn *v.* Guntner, 167 Mass. 92, 99, 44 N. E. 1077, and cases cited. There are numerous subsequent decisions to the same effect.

[11] This did not escape notice. In Brandreth *v.* Lance, 8 Paige, 24 (1839), Walworth, C., said: "But it may perhaps be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property only, when in fact the object of the plaintiff's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence as a matter of feeling only."

[12] 10 Vesey Jr. 192.

the way of the right result, but found a way around it to that result, so here, while apparently denying the legal right and in terms cautiously restricting the jurisdiction of equity to the securing of interests of substance, with which it had long been occupied, he found a way to take the great forward step of securing plaintiff in her sensibilities and protecting her right of privacy by securing a right in property which had no value as property and was a mere formal peg on which to hang the substantial relief. But there were other reasons for this cautious mode of concealing a bold step. For one thing at that time courts of equity were hesitant in dealing with torts, feeling a natural reluctance to try questions which were adapted peculiarly to trial by jury, in view of the unsatisfactory method of taking evidence in equity. Again he might properly fear infringement of freedom of the press, a point to be considered presently. Again 1818 was too early to be raising a question of the legal right of privacy. But if the jurisdiction of equity was to be invoked it was necessary to find a legal right and a legal tort. Most of all, however, Lord Eldon's language (as distinguished from his action) was influenced by the *dicta* of Lord Hardwicke in *Huggonson's Case*.[13] What, then, was the state of the authorities prior to *Gee* v. *Pritchard?*

In *Huggonson's Case*, pending a suit in chancery, certain newspapers printed articles attacking the parties upon one side and reflecting upon their witnesses, who were said to have "turned affidavitmen." Application was made to commit the publishers for contempt. Here the publication with reference to the pending cause for the purpose of deterring witnesses from testifying was a clear contempt for which the authors and publishers could and should be punished.[14] Lord Hardwicke said that he could deal with the matter only as a contempt, as an interference with the course of justice in the pending cause, not as a libel. Evidently this meant that he could not punish the publication as a libel, but only as a contempt. Nothing else was before the court, and the punishment of libels as libels belongs to the criminal law. There is no reason to suppose he meant that interests of personality could not be protected in equity or that a wrong could not be prevented in equity,

[13] 2 Atk. 469.

[14] The leading American case is Resp. *v.* Oswald, 1 Dall. 319, which has been followed ever since.

where it involved irreparable injury and the legal remedy was wholly inadequate, merely because it took the form of a libel. The question of enjoining a libel which interferes with the course of justice in a pending cause was not involved.[15]

Two other *dicta* prior to *Gee* v. *Pritchard* remain to be noticed. In *Burnet* v. *Chetwood*,[16] Lord Parker (afterwards Lord Macclesfield) argues that the chancellor has a general superintendency over all books and hence may abate immoral books as a nuisance. This was after the parliamentary censorship of the seventeenth century had come to an end. But the old royal censorship, to which the chancellor might claim to have succeeded, had ceased in Tudor times. Obviously the *dictum* went very much too far. But it goes to show that when Lord Eldon foreclosed the matter by his offhand remarks in 1818 it was by no means settled by authority. Indeed a characteristic *dictum* of Lord Ellenborough in 1810 shows what some lawyers at least thought at that time. In *DuBost* v. *Beres-*

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[15] The English courts enjoin such publications. In Coleman *v.* Railway Co. (1860), 8 W. R. 734, Sir W. Page Wood, V. C., enjoined one of the parties pending litigation, from publishing garbled accounts tending to prejudice his adversary's case. He cites Huggonson's Case. In Kitcat *v.* Sharp, 52 L. J. Ch. 134, the same question was before Fry, J., and he granted an injunction citing the Coleman case. This is after the Judicature Act. But the Coleman case was before that act and is a clear authority for power to enjoin such libels without a statute.

In Dailey *v.* Superior Court, 112 Cal. 94, 44 Pac. 458, Durrant was on trial in San Francisco for murder. Pending the prosecution, Dailey produced in San Francisco a play, entitled "The Crime of a Century," purporting to depict the murder. The trial court ordered him to cease advertising and producing the play. The Supreme Court held, one judge dissenting, that there was no jurisdiction to make the order. Neither of the English cases in point was referred to. The chief argument was that the order interfered with free speech, guaranteed by the Constitution, but it was said also that if equity could interfere in such a case it could do so only in order to protect property. One might perhaps ask whether this injury to public justice could not have been enjoined upon information, as in case of a public nuisance. The spectacle purporting to represent the murder is not very different in principle from the prize-fighting spectacles that have been enjoined. Columbian Athletic Club *v.* State, 143 Ind. 98, 40 N. E. 914; Atty.-Gen. *v.* Fitzsimmons, 35 AM. LAW REG. 100. And the posters and other advertising are not like ordinary publications. Certainly indecent posters on defendant's property which injured public morals could be reached in this way. Why not, then, libelous posters which interfere with the course of justice in a pending cause? Some of the results of denying an injunction in such cases may be seen in People *v.* Durrant, 116 Cal. 179, 223, 225–26, 48 Pac. 75, 87, 88.

It should be said that the Supreme Court of the United States took the same position *arguendo* in Patterson *v.* Colorado, 205 U. S. 455, 462.

[16] (1720), 2 Meriv. 441, note.

ford[17] an artist had painted a picture entitled "Beauty and the Beast," which, the report tells us, "was a scandalous libel upon a gentleman of fashion and his lady." The picture was exhibited for money and great crowds went to see it. Defendant, the brother of the lady, cut it to pieces and was sued in trespass by the owner. Lord Ellenborough said *obiter* that upon application to the chancellor he would have granted an injunction against the exhibition. Here the interest involved in a suit for an injunction would have been one of personality. The basis of the plaintiff's claim would have been reputation or privacy. There was no writing or speaking, and no infringement of liberty would have been involved beyond that involved in any injunction. The remedy at law was grossly inadequate. If Lord Ellenborough was wrong and if Mr. Campbell (as he then was) should have put this case in his drawer for bad law, it was not because of authority or because of any difficulty on principles of equity jurisdiction, but because equity was just learning to enjoin torts generally and was held back by its mode of trying questions of fact.

It may be repeated, Lord Eldon's *dicta* in *Gee* v. *Pritchard* were over-cautious. But, as in *Lane* v. *Newdigate*, his action was bold. He did in effect secure a right of privacy by the transparent device of protecting a nominal property in the letters.

Supposing, however, that only rights of property may be protected in equity, what does "property" mean in this connection? This question arose in *Dixon* v. *Holden*.[18] In that case defendants were about to publish falsely (and knowing it to be false) that plaintiff was a partner in a bankrupt firm and that he had defrauded the creditors of that firm. An injunction was granted. It will be noted that the interest involved was wholly one of substance. The injury threatened was to credit and business reputation and involved de-

[17] 2 Camp. 511. "Lord Ellenborough ought to have been particularly grateful to me for suppressing his bad decisions. . . . Before each number was sent to the press, I carefully revised all the cases I had collected for it and rejected such as were inconsistent with former decisions or recognized principles. When I arrived at the end of my fourth and last volume, I had a whole drawer full of 'bad Ellenborough law.'" Autobiography of Lord Campbell, HARDCASTLE, LIFE OF LORD CAMPBELL, I, 215. There is nothing in the case of DuBost *v.* Beresford worthy of a report unless it is the *dictum* in question. Hence the remark of the editor of the State Trials as to the astonishment with which it was received by the profession (20 How. St. Tr. 799, note) is probably apocryphal.

[18] 7 Eq. 488.

struction of plaintiff's business. But it was argued for the defendant that equity had no jurisdiction unless property was involved, and counsel seem to have taken property to mean such property as may be bought and sold. The court rejected this argument, holding that equity had power to secure not only one's business but his business reputation against wrongful injury.

Malins, V. C., said:

"I am told that a Court of Equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to, and cannot be denied, that the effect of this will be seriously damaging to the Plaintiff's business of a merchant.

"Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property."

This may seem to confuse the two aspects of reputation and to indicate that the court thought of reputation on its purely personal side, where the injury goes to feelings, sensibility, and honor, as only a specially valuable asset. Possibly the meaning is that no matter whether the interest is one of personality or one of substance, the suit should be entertained on principles of equity jurisdiction. Or it may mean that reputation is always an asset and so should be secured by equity as such because in case of such an asset the legal remedy is necessarily inadequate. If the latter is meant, we cannot agree. But the interest in this case was one of substance only and the distinction did not press. The court might have assumed that equity protected rights of property but not rights of personality, and reached the same conclusion. The main point discussed was whether business credit and standing were entitled to protection as being property. Granting that they were, it remained to consider whether equity could protect them by injunction in view of the

policy of the law as to freedom of speech. This point is not referred to. But there is an elaborate review of the prior cases in order to show that an injunction was not precluded by authority. As to the injunction against libel, *Dixon* v. *Holden* is generally regarded as overruled by *Prudential Assur. Co.* v. *Knott.*[19] On the point chiefly argued, however, the view taken as to the meaning of the term property in connection with equity jurisdiction still obtains.[20] In any event, therefore, so far as defamation infringes interests of substance, there is ample warrant for resort to equity for relief, unless the two obstacles next to be considered stand in the way.

Next in order we must inquire whether common-law policy or constitutional provisions as to freedom of the press preclude relief by injunction against libel or written disparagement of property. The case which long determined the course of decision upon this point is *Brandreth* v. *Lance.*[21] In that case the plaintiff was a manufacturer of pills which had come into extensive use, and in consequence was generally well known. The defendant, a discharged employee, was about to publish a pretended life of "Benjamin Brandling . . . a distinguished pill vender," so palpably intended as a libel on the plaintiff that no one could misunderstand it. Suit was brought to enjoin this publication. It is clear that the interest which plaintiff sought to protect was one of personality only. There was some attempt to plead a threatened injury to plaintiff's business. But it was feeble and the court rightly considered that no such injury was involved. It is clear also that no roundabout mode of protecting personality such as that resorted to in *Gee* v. *Pritchard* was possible. The case was one of threatened invasion of privacy and of threatened defamation injuring the plaintiff's reputation, not as part of his substance, but as part of his personality. The chancellor sustained a demurrer on two grounds, one, that in any event equity will only protect property rights, interests of substance, not interests of personality; the other, that an injunction against defamation would infringe the liberty of the press and run counter to constitutional guarantees. "Principles of free government," we are told, require that preventive justice be in

[19] 10 Ch. App. 142.

[20] This has been settled in the cases involving interference with business relations by strikes and boycotts. 6 POMEROY, EQUITY JURISPRUDENCE, 3 ed., §§ 592, 594. *Cf.* Monson *v.* Tussauds, [1894] 1 Q. B. 671.

[21] 8 Paige, 24.

abeyance where the wrongs complained of involve printing, publishing, or writing.

At the outset we might ask, why does not this argument apply equally to such a case as *Gee* v. *Pritchard?* For not only is that case cited and relied upon in *Brandreth* v. *Lance*, but it has been followed and approved universally.[22] Probably the answer would be that in such a case as *Gee* v. *Pritchard* the defendant is not writing or publishing his own sentiments, opinions, or views, but is publishing those of another in which the other has a property. He is not endeavoring to give public utterance to his own ideas and opinions, he is trying to steal or destroy another's property by publishing another's writings to the world. Obviously the common-law policy or constitutional provision has no reference to such a situation. But the courts have not limited injunctions on the authority of *Gee* v. *Pritchard* to cases where A is about to print B's unpublished lectures or the manuscript of his unpublished book or letters of literary character and merit which he has written. They conceive that there is sufficient property in any private letter to meet the rule. Yet it might be urged that even so free speech on the part of A is not involved, as it may be where a defendant publishes his own composition.

In order to show a common-law policy against enjoining a libel where the remedy at law is grossly inadequate, the chancellor in *Brandreth* v. *Lance* relies on two things — the abolition of the Star Chamber, and the Impeachment of Sir William Scroggs. As to the first point, he says:

"The court of Star Chamber in England once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages (Hudson's Star Chamber, 2 Collect. Jurid. 224). And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation." [Citing the case of the injunction against the "Weekly Packet of Advice from Rome" for which Chief Justice Scroggs was impeached.][23]

[22] See 4 POMEROY, EQ. JUR., § 1353; 2 STORY, EQ. JUR., §§ 948, 948 *a*.

[23] 8 Paige, 24, 27.

The statement as to injunctions against libel in the Star Chamber seems to be quite without foundation. No case where the Star Chamber enjoined a libel appears in the Star Chamber cases in the Selden Society volumes, in the portions of Hudson's Star Chamber relating to civil jurisdiction (§ 4), libel (§ 11), or injunctions (§ 20), nor in the portions of Coke's Third and Fourth Institutes treating of the Star Chamber and of Libels. Indeed the chancellor does not say that he knows of any such case, and there is none in Hudson, which he cites. What the Star Chamber did was to punish libels and unlicensed writings as misdemeanors. The Star Chamber had a certain civil jurisdiction.[24] But no one seems to have urged that enjoining defamation was an item thereof. As to the impeachment of Sir William Scroggs,[25] the third article was based on an injunction issued by the Court of King's Bench against a publication of an unlicensed book. It was a sort of injunction against a public nuisance granted by the court with no case before it and without a hearing. Even if the book was a nuisance, the court could not abate it till after conviction. This arbitrary and high-handed proceeding has no relation to the question under consideration.

We are brought, then, to the question which is the crux of the matter in this country, namely, what is an infringement of freedom of the press and freedom of speech, as guaranteed by the bills of rights in American constitutions? Historically these provisions are connected with censorship of publications in England. At first this censorship was exercised by the Crown, later by the Star Chamber, and finally by Parliament, which provided for the censoring of all written publications down to 1694, when the statute for the time being expired and was not renewed. Writers of the end of the eighteenth century took this obsolescence of the censorship as declaratory of a natural or common-law principle of liberty of the press, as one of the rights of Englishmen. Accordingly our bills of rights guarantee freedom of speech and of publication as an individual natural right. Blackstone, whose views were generally accepted as common law in this country when the bills of rights were framed, holds that liberty of the press means simply the absence of restraints upon publication in advance as distinguished from liability, civil or crim-

[24] Hudson, Star Chamber, § 4, 2 COLLECTANEA JURIDICA, 55.

[25] 6 How. St. Tr. 198.

inal, for libelous or improper matter, when published.[26] Story contends that it was intended to guarantee liberty of publishing the truth, with good motives and for proper ends, and approves a distinction between political publications, criticisms, and general discussions on the one hand and mere defamation of private individuals on the other hand.[27] A third view is taken by Cooley. He considers that the bills of rights guarantee "not only liberty to publish but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character, when judged by such standards as the law affords." [28] In other words, printing and speaking are to be subject to general rules of law, not to administrative censorship or arbitrary legislative restriction. The cases are most nearly in accord with this view.

Of the three doctrines as to the scope of liberty of publication, only Blackstone's would justify the position taken in *Brandreth* v. *Lance*, namely, that there can be no preventive judicial justice as against defamation; that as to writing and speaking, all legal action must necessarily come after the act. But this view is open to obvious criticism. For if liability for any sort of publication which the legislature chooses to penalize may be imposed upon the publisher after the act, the result may easily be to effectually prevent indirectly and so establish a censorship and evade the guarantee. Blackstone's doctrine has usually been criticised as not going far enough in securing against imposition of liability after publication upon arbitrary or unreasonable grounds. Equally it goes too far in denying to the law all power of restraint before publication. Although its best title to consideration is in the history of the subject, it goes beyond what history indicates as the main purpose, namely, freedom from a régime of general censorship and license of printing.

No very clear line is to be found in the decisions. Excepting *Brandreth* v. *Lance* and the cases following it, Blackstone's view has been urged chiefly in *dicta*.[29] So far as imposition of liability

[26] 1 BLACKSTONE, COMMENTARIES, 152–53. *Cf.* the *dicta* of Lord Cottenham in Fleming *v.* Newton, 1 H. L. Cas. 363, 376.

[27] 2 STORY, CONSTITUTION, §§ 1880, 1886. Cf. Kent, C. J., in People *v.* Croswell, 3 John. Cas. 393. See also State *v.* Pioneer Press Co., 100 Minn. 173, 176, 110 N. W. 867.

[28] CONSTITUTIONAL LIMITATIONS, 441–42.

[29] *E. g.*, "Besides it is well understood and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous re-*

after publication interferes with freedom of publication, four limitations are well established: (1) The constitutional provision does not guarantee the liberty to intimidate by speech and writing.[30] If this limitation may be enforced preventively as well as by penalty or damages, there is sufficient support for the cases presently to be noted, where publication incidental to or as part of an unlawful system of coercion or intimidation was enjoined.[31] It will be seen that the only courts which clearly hold to the contrary in the latter case are those of Missouri and Montana. But the decisions in the former jurisdiction are not very consistent. Although in *Marx* v. *Watson*[32] the court held that the constitution protected a power to

straints upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots toward enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction." Com. *v.* Blanding, 3 Pick. (Mass.) 304, 313.

The comparison is significant. See the remarks of Brown, J., in Robertson *v.* Baldwin, 165 U. S. 275: "The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy, (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (U. S. *v.* Ball, 163 U. S. 662, 672,); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (Brown *v.* Walker, 161 U. S. 591, and cases cited). Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial."

Blackstone's doctrine is announced in Patterson *v.* Colorado, 205 U. S. 455, 462. But the same court upholds "previous restraint" upon publication when incidental to enjoining an unlawful boycott. Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 437.

[30] See, for example, Thomas *v.* Railway Co., 62 Fed. 803; Jordahl *v.* Haydn, 1 Cal. App. 696, 82 Pac. 1079.

[31] *Infra*, note 41.

[32] 168 Mo. 133, 67 S. W. 391. But see Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106.

intimidate through publication, in *State* v. *McCabe*[33] it held that the constitution did not protect a creditor in the power to compel a debtor to pay a just debt by publishing that it was unpaid and injuriously affecting the debtor's credit — even if the publication was true. In *State* v. *Shepherd*[34] the same court seems to adopt Story's doctrine. (2) The constitution does not protect the citizen in publishing immoral or indecent matter, nor guarantee such publication against prohibition by the legislature. All the courts seem to agree to this.[35] (3) It does not give immunity for contempt in interfering with the course of justice. All courts are agreed as to this,[36] though as we have seen, the sole American decision is against enforcement of this limitation preventively to secure a litigant against unlawful interference with his right to obtain justice in the courts by threatening or prejudicial publications. It may be noted that this question was involved in the earliest reported suit to enjoin a libel.[37] (4) The constitutional provision does not preclude restrictions upon publication dangerous to the conduct of military operations in time of war.[38] In the foregoing cases the legislature may prohibit publication and impose adequate penalties to enforce the prohibition. Except for the matter of trial by jury, to be considered presently, the difference between this course and the finding of a court that a threatened publication involves gross and palpable violation of private rights for which damages would be no remedy, followed by a contempt proceeding in case of violation, is

[33] 135 Mo. 450, 37 S. W. 123.

[34] 177 Mo. 205, 76 S. W. 79. In Flint *v.* Hutchison Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, the court said that repetition of a libel after it had been so pronounced by a jury might be enjoined.

[35] Typical discussions may be seen in State *v.* McKee, 73 Conn. 18, 46 Atl. 409, and People *v.* Most, 171 N. Y. 423, 64 N. E. 175.

[36] See *supra*, note 14.

[37] Elnet *v.* Belgrave (1395 or 1396) Baildon, Sel. Cas. Ch. No. 108. In this case plaintiff and defendant were litigating in the ecclesiastical court. The official (clerical judge of first instance) had fixed a day for hearing and defendant grossly libeled the official in order to deter him from hearing the cause. This was a contempt and a court might deal with it as such. But apparently the libel deterred the judge from doing anything. The official did not proceed for contempt nor sue to protect his interest of personality, but the plaintiff sued in equity to enjoin repetition of the wrong which prevented him from getting justice. Hence the question was not one of enjoining a libel *as such*, but of whether plaintiff's interest of substance could be secured by enjoining a libel on a third person which had the effect of paralyzing the legal machinery plaintiff was entitled to employ in vindication of his rights.

[38] *Ex parte* Vallandigham, 1 Wall. (U. S.) 243.

not very substantial. It cannot be denied that for the most part these limitations may be reconciled with the doctrine that all preventive interference with publication is prohibited. But that doctrine makes the guarantee merely formal, and unless the language of the bill of rights in a particular jurisdiction clearly adopts Blackstone's view, it might well be held that there are limitations on the guarantee, whether invoked against preventive or against remedial justice.

A number of decisions adopt the view of *Brandreth* v. *Lance*, that the constitutional guarantee of free speech and free publication absolutely precludes an injunction against speaking and writing under any circumstances.[39] But most of the cases which accord with the result of that decision proceed either upon the proposition that equity will not protect interests of personality or simply on authority.[40]

On the whole, the argument that defamation may not be enjoined because of the constitutional obstacle is the soundest reason that can be given for the doctrine of *Brandreth* v. *Lance*. But this argument is open to four observations: (1) As has been said already, it proceeds on a formal interpretation of the guarantee that deprives it of substantial efficacy when applied to legislation imposing prohibitive penalties. Moreover, so interpreted, the constitution would forbid administrative prevention of false labels under a pure food law. (2) It rests chiefly on history. But if history is to be the sole criterion of interpretation, Story's view is more nearly in accord with the ends indicated by the historical development of the subject. Moreover, it is generally conceded that this restricts the scope of the guarantee too narrowly. Hence it would seem that we cannot safely rely on history to give us the proper construction. (3) None of the cases that make this view of the constitution the basis of denying relief argue the question of the meaning or limitations of the constitutional guarantee. They are content to cite *Brandreth* v. *Lance*, where the interpretation is as-

[39] Life Ass'n *v.* Boogher, 3 Mo. App. 173; Marlin Fire Arms Co. *v.* Shield, 171 N. Y. 384, 64 N. E. 163; Juvenile Society *v.* Roosevelt, 7 Daly 188; Dopp *v.* Doll, 13 Weekly Law Bull. 335; Judson *v.* Zurhurst, 30 Ohio Circ. Ct. R. 9.

[40] Balliet *v.* Cassidy, 104 Fed. 704; Vassar College *v.* Loose-Wiles Biscuit Co., 197 Fed. 982; Donaldson *v.* Wright, 7 App. D. C. 45 (*semble*); Christian Hospital *v.* People, 223 Ill. 244, 79 N. E. 72; Meyer *v.* Journeyman Stonecutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 792; De Wick *v.* Dobson, 18 App. Div. 399, 46 N. Y. Supp. 390; Owen *v.* Partridge, 40 Misc. 415, 82 N. Y. Supp. 248.

sumed. (4) A growing number of decisions allow an injunction where the writing or publication is part of a wrong which would be enjoined of itself.[41] But this would be wrong on Blackstone's theory and also under the view taken in *Brandreth* v. *Lance*. Under such circumstances this basis seems a doubtful one on which to rest a sweeping rule that admittedly results in great injustice.

If it be conceded that the constitutional guarantee of free publication does not interpose an insuperable obstacle, the question next arises whether a common-law policy of trial of questions of defamation by jury, declared by Fox's Libel Act and analogous statutes in this country, requires the issue as to truth of the publication sought to be enjoined to be tried by jury and so precludes jurisdiction in equity. This point was first raised in *Fleming* v. *Newton*.[42] In that

[41] Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551; Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418; Emack *v.* Kane, 34 Fed. 46 (intimidation by false circulars maliciously issued); Cœur D'Alene Mining Co. *v.* Miners' Union, 51 Fed. 260 (intimidation of employees); Casey *v.* Cincinnati Typographical Union, 45 Fed. 135 (handbills incidental to boycott); Lewin *v.* Welsbach Light Co., 81 Fed. 904; Seattle Brewing Co. *v.* Hansen, 144 Fed. 1011 (notices incidental to boycott); American Federation of Labor *v.* Bucks Stove & Range Co., 33 App. D. C. 83 (advertisement as part of boycott); National Life Ins. Co. *v.* Myers, 140 Ill. App. 392 (malicious publication as part of conspiracy to destroy business); Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280 (libel incident of malicious attempt to destroy plaintiff's business); Gilly *v.* Hirsh, 122 La. 966, 48 So. 422 (libelous sign treated as nuisance); Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307 (nuisance in form of banners displayed in front of plaintiff's premises); Beck *v.* Teamsters' Protective Union, 118 Mich. 497, 77 N.W. 13; Pratt Food Co. *v.* Bird, 148 Mich. 631, 112 N. W. 701 (bill of peace, unlawful threats of prosecution in printed circular); Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106 (intimidation); Gilbert *v.* Mickle, 4 Sandf. Ch. 357 (placard posted before door of auctioneer warning against "mock auctions"); Newton *v.* Erickson, 70 Misc. 291, 126 N. Y. Supp. 949; McCormick *v.* Local Unions, 32 Ohio Cir. Ct. R. 165 (printed cards in course of boycott).

Francis *v.* Flinn, 118 U. S. 385 (*semble*); Citizens' Light Co. *v.* Montgomery Light Co., 171 Fed. 553; Reyer *v.* Middleton, 36 Fla. 99, 17 So. 937 (cloud on title); Marx *v.* Watson, 168 Mo. 133, 67 S. W. 391 (boycotting); Lindsay *v.* Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127. *Contra*.

Also there is coming to be good authority for enjoining circulars charging infringement of a patent and threatening purchasers from plaintiff with legal proceedings, where such circulars are published with no intention of suing for the alleged infringement or in pure malice. Celluloid Mfg. Co. *v.* Goodyear Dental Co., 13 Blatchf. 375 (*semble*); Emack *v.* Kane, 34 Fed. 46; Kelly *v.* Ypsilanti Mfg. Co., 44 Fed. 19 (*semble*); Lewin *v.* Welsbach Light Co., 81 Fed. 904; Farquhar *v.* National Harrow Co. (C. C. A.), 102 Fed. 714; Adriance *v.* National Harrow Co. (C. C. A.), 121 Fed. 827, 98 Fed. 118; Dittgen *v.* Racine Paper Co., 164 Fed. 85; Electric Renovator Co. *v.* Vacuum Cleaner Co., 189 Fed. 754; Atlas Underwear Co. *v.* Cooper Underwear Co., 210 Fed. 347; Bell *v.* Singer Mfg. Co., 65 Ga. 452 (*semble*).

[42] 1 H. L. Cas. 363.

case the Court of Session in Scotland had granted an interdict against publication of a public record of protested and dishonored bills and notes. This order was reversed on the ground that anyone had a right to publish the contents of the public record as a matter of general information, so that there was no legal wrong and no ground for the proceeding, apart from any question of power to enjoin a libel. But Lord Cottenham said *obiter* that if the Court of Session claimed the power to enjoin libels, it must be considered —

"How the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under the 55 Geo. 3, cap. 42 [Fox's Libel Act] or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel and defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilites attached to the publication of libels." [43]

The second point urged in this *dictum* has been discussed above. What shall we say as to the first point?

It might be argued that Fox's Libel Act applies only to criminal prosecutions and to actions on the case for damages; that it does not refer to the jurisdiction of equity at all, nor was it intended to affect procedure in equity. It was enacted because courts of law had been directing verdicts upon the question whether a publication was or was not a libel. But this had been happening in prosecutions where courts took it on themselves to pronounce publications libelous from mere inspection of their contents, irrespective of the truth of their contents or the motives of publication. Hence, for example, the statute had no reference to failure of a defendant to prove the truth of a publication libelous *per se* and a consequent charge that the defendant in an action for libel had failed to sustain the burden of proof which the law casts upon him. Accordingly two answers might be made to Lord Cottenham's *dicta*. First, it might be said that neither in terms nor upon consideration of the mischiefs that led to its enactment does Fox's Libel Act apply to the remedy, if any, in equity. But this would be unduly narrow. After all there is a clear policy in favor of jury trial of an issue of truth in a charge of defamation. Juries are peculiarly adapted to try such an issue, so that in England to-day, where relatively few civil cases are tried to juries, libel, slander, malicious prosecution,

[43] *Id.*, 376.

and breach of promise are regularly so tried. Secondly, however, it might be urged that, granting such a policy, where it is admitted that the publication is false, or the falsity is so clear that there is really nothing for a jury to try, then, trial by jury being a mere form — there being no substantial occasion for it — the policy in question should not stand in the way of an injunction. The great majority of cases where an injunction has been sought have been of this character. Hence the requirement of trial by jury is no more an obstacle here than in the case of equity jurisdiction to enjoin trespass,[44] disturbance of easements,[45] or nuisance.[46] But it must be admitted that Lord Cottenham put his finger on a serious difficulty in the way of injunctions in these cases.[47]

Although the arguments thus far were wholly satisfactory in principle, it might still be argued that the settled course of decision against injunctions in case of defamation or disparagement of property has put the matter where it may only be reached by legislation. The cases prior to *Gee* v. *Pritchard* and *Brandreth* v. *Lance* have already been considered. The subsequent English cases which seem to sustain jurisdiction in equity are collected in *Dixon* v. *Holden*.[48] Some of these are worthy of brief notice. *Springhead Spinning Co.* v. *Riley*,[49] decided by the same judge who decided *Dixon* v. *Holden*, was a case of intimidation by placards and advertisements, exactly like the American cases above referred to.[50] The injunction ran against all forms of coercion or intimidation of plaintiff's employees, and incidentally against intimidation by publications. There was no issue of fact as to the truth of the placards or notices. Hence the policy of trial by jury was not involved. One could pronounce the decision wrong only by adopting Blackstone's doctrine as to

[44] Miller *v.* Lynch, 149 Pa. St. 460, 24 Atl. 80; Hart *v.* Leonard, 42 N. J. Eq. 416, 418, 7 Atl. 865.

[45] Selby *v.* Nettlefold, 9 Ch. App. 111; Newell *v.* Sass, 142 Ill. 104, 31 N. E. 176; Kelly *v.* Saltmarsh, 146 Mass. 585, 16 N. E. 460; McConnell *v.* Rathbun, 46 Mich. 303, 9 N. W. 426; French *v.* Smith, 40 N. J. Eq. 361, 3 Atl. 130.

[46] The cases are collected in 1 AMES' CASES IN EQUITY JURISDICTION, p. 559, note.

[47] Lord Cottenham seems to have thought that Fox's Libel Act applied only to "injuries to the person by defamation." In Dixon *v.* Holden, 7 Eq. 488, Malins, V. C., thought to distinguish injuries to business by defamation on that ground. But no such line may be drawn. For one thing, in Fleming *v.* Newton the injury was to credit only. Again it is evident that Lord Cottenham was simply making a distinction between publishing one's own composition and such a publishing as was threatened in Gee *v.* Pritchard.

[48] 7 Eq. 488. [49] 6 Eq. 551. [50] *Supra*, note 41.

liberty of publication. *Routh* v. *Webster* [51] was an injunction against publication of plaintiff's name without authority as a trustee of a newly formed company. Here again no question could arise under Fox's Libel Act. Plaintiff was not seeking to prevent defamation. Instead he sought to protect himself against vexatious claims by creditors of the company to hold him as trustee. Question could arise only in case Blackstone's doctrine of liberty of the press were adopted. It might be said that the use of plaintiff's name as trustee was not an expression of belief or opinion. Still it was a statement of fact made as if and purporting to be true. *Clark* v. *Freeman* [52] was a case of unauthorized use of the name of a famous physician in advertising a pill made by defendant. The wrong was the appropriation of plaintiff's name, which had become a valuable bit of property through plaintiff's skill, learning, and experience in his profession. In such case a name ought to be protected the same as any other property.[53] The court denied an injunction on the ground that no special damage was shown — a ground which is now regarded as quite untenable — and said also that if the published statement was defamatory, as falsely imputing to plaintiff that he was concerned in making and vending a quack medicine, the issue of falsity would have to be established at law before there could be an injunction. This is a familiar proposition in suits to enjoin torts. But it has much more justification here than in the case of other torts because of the policy of the law as to jury trial of the question of libel or no libel.

The English cases since *Gee* v. *Pritchard* which deny jurisdiction to enjoin defamation are collected in *Boston Diatite Co.* v. *Florence Mfg. Co.*[54] and *Prudential Assurance Co.* v. *Knott.*[55] These two decisions have exercised a controlling influence in the United States.

In *Boston Diatite Co.* v. *Florence Mfg. Co.* the bill set up that plaintiff was manufacturing toilet articles under a patent and that defendant, which had an unpatented process from which it made competing articles, fraudulently, in order to get an unfair advantage over plaintiff, represented that it owned a patent covering plaintiff's process and that plaintiff was infringing its patent, and threatened

[51] 10 Beav. 561.

[52] 11 Beav. 112.

[53] Maxwell *v.* Hogg, L. R. 2 Ch. 307; Edison *v.* Edison Polyform Co., 73 N. J. Eq. 136, 67 Atl. 392.

[54] 114 Mass. 69.

[55] 10 Ch. App. 142.

those who bought from plaintiff with liability for infringement. A demurrer was sustained. It will be observed that the interest involved was one of substance, not of personality; that, while liberty of publication was involved if Blackstone's doctrine is to be adopted, the publication was admittedly false, malicious, and threatening, and that the case was not within the purview or the policy of Fox's Libel Act. The case was one of disparagement of property; of slander of title and cloud cast on the title to plaintiff's patent by defendant's false and malicious publications. In sustaining the demurrer, the court asserts that equity has no jurisdiction to prevent slander or libel, to prevent false representations as to the quality or character of a plaintiff's property, or to prevent slander of title to a plaintiff's property, unless breach of trust or breach of contract is involved. These propositions are not argued in the least. It is assumed that they are concluded by authority, the court holding *Dixon* v. *Holden* and *Springhead Spinning Co.* v. *Riley* to be contrary to the settled doctrine of the English cases. As the wrong here was an injury to property, the objection, on principle, would have to proceed on infringement of liberty of publication. The same court had previously removed a cloud on the title to personalty by canceling an invalid mortgage asserted by defendant.[56] But apparently it would remove a cloud on the title to a chattel only by injunction coupled with cancellation, not by an injunction alone, when, as in this case, there was nothing to cancel. And yet in any decree removing a cloud on title there is likely to be an injunction against asserting the wrongful claim which, according to Blackstone's view, would infringe liberty of publication. Hence the decision must rest where the court puts it, namely, squarely upon authority, and the only authorities exactly in point at that time were the two decisions of Vice-Chancellor Malins, which the court rejects. For decisive authority it refers us to the *dicta* of Lord Hardwicke, Lord Eldon, Lord Cottenham, and Lord Campbell, already discussed, and to two other cases which must next be looked into.

In *Seeley* v. *Fisher* [57] plaintiff owned the copyright of the last edi-

[56] Sherman *v.* Fitch, 98 Mass. 59. *Cf.* cases where equity removes a cloud cast upon a title by oral assertions of adverse claims. Morot *v.* Germania Co., 54 Ind. 37; Rausch *v.* Trustees, 107 Ind. 1, 8 N. E. 25.

[57] 11 Sim. 581.

tion of Dr. Scott's "Commentary on the Bible." As Dr. Scott was old at the time, this last edition was the joint product of the author and an assistant and was not complete when the author died. Defendants were reprinting the last prior edition, written wholly by Dr. Scott. They advertised it as containing "the whole unadulterated labors of the author, not as re-edited by a different hand and an inferior mind." An injunction against such advertisements was rightly refused. There was no legal wrong. The case in this respect is like *White* v. *Mellin*.[58] A puffing advertisement, recommending one's wares as against plaintiff's, is not actionable, at least if it does not contain false statements as to plaintiff's wares. Moreover, if the statements or any of them could be proved to be false, the question was clearly doubtful and hence a jury trial would be the proper course.

In *Mulkern* v. *Ward*[59] plaintiffs were trustees of a building society which was also a bank of deposit. Defendant was what might be called a crank on the subject of building societies. He wrote a book on the subject in which he attacked plaintiffs' society, among others, criticised its balance sheet, and argued that such companies could not be solvent. The court properly refused an injunction, distinguishing the case from *Dixon* v. *Holden* in that the defendant was publishing an opinion, an argument, not a maliciously false assertion of fact. In truth there was no tort here at all, so that the criticism of *Dixon* v. *Holden* was wholly unnecessary. Nor does the decision sustain *Boston Diatite Co.* v. *Florence Mfg. Co.*, for in the latter case there was a wrongful threat and an admittedly false statement published to get an unfair advantage over a rival by deterring the public from buying his wares. In *Mulkern* v. *Ward* there was no threat. There was an argument and a statement of opinion. If there was a statement of fact, there was a doubtful question whether it was true or false so that the cause called for trial by jury.

It is admitted in the opinion in *Boston Diatite Co.* v. *Florence Mfg. Co.* that if there had been a relation of trust or a contract between plaintiff and defendant, there could be an injunction. This statement is very common in the books. One may enjoin a breach of contract and incidentally have an injunction against publication; he may enjoin breach of trust and incidentally have an injunction against publication; he may have a decree canceling a cloud on

[58] (1895) A. C. 154.

[59] 13 Eq. 619.

title and incidentally have an injunction against assertion of a claim under it. In other words, there is no objection to "previous restraint" upon publication by injunction if only it may be tacked to something else!

A long line of decisions accord with *Boston Diatite Co.* v. *Florence Mfg. Co.*[60] But most of them involve the point that pending an infringement suit one is wholly within his rights in publishing to the world that he is bringing the suit and will endeavor to hold all infringers, or that one who is about to bring such a suit is within his rights in publishing in good faith what he claims and what he will attempt to do, unless such publication will interfere with the course of justice. In each case there is no legal wrong. In consequence the *dicta* following the more sweeping denial of relief in the *Diatite* case are of much less weight.[61] Moreover, a strong current of authority contrary to the *Diatite* case has arisen in the federal courts.[62] These decisions seem to be right on three grounds: (1) The publications involve malicious threats and the injunction is against the intimidation of plaintiff's customers and wrongful interference with his business relations thereby.[63] (2) They are not statements of belief or sentiment or opinion within the principle of freedom of publication. (3) In substance they do not involve any question of truth or falsity for a jury to try. Almost without exception they are cases of what may be called hold-ups, defendant having no real intention to sue and often no serious pretense of a claim to sue upon.

In *Prudential Assurance Co.* v. *Knott*[64] defendant published a

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[60] Chase *v.* Tuttle, 27 Fed. 110 (*semble*); Kidd *v.* Horry, 28 Fed. 773; Baltimore Car Wheel Co. *v.* Bemis, 29 Fed. 95; Welsbach Light Co. *v.* American Incandescent Light Co., 98 Fed. 613; Hobbs *v.* Gooding, 113 Fed. 615; Warren Featherbone Co. *v.* Landauer, 151 Fed. 130; Whitehead *v.* Kitson, 119 Mass. 484; Consumers Gas Co. *v.* Kansas City Gas Light Co., 100 Mo. 501, 13 S. W. 874; Mauger *v.* Dick, 55 How. Pr. 132; Cohen *v.* United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341. *Contra*, Croft *v.* Richardson, 59 How. Pr. 356.

[61] In Rollins *v.* Hinks, 13 Eq. 355, and Axmann *v.* Lund, 18 Eq. 330, Malins, V. C., who uniformly exhibited much good sense on this subject, held that a conditional injunction should issue enjoining publications like the one in the Diatite case, unless the defendant would undertake to sue at once to try the validity of the patent. Otherwise defendant could do plaintiff a great injury by threats which he had no intention of carrying out. The Irish chancery refused to take this course in Hammersmith Skating Rink Co. *v.* Dublin Skating Rink Co., 10 Ir. R. Eq. 235.

[62] See cases cited in the last paragraph of note 41, *supra*.

[63] See cases cited in the first paragraph of note 41, *supra*.

[64] 10 Ch. App. 142.

pamphlet on life insurance companies, giving statistics as to their incomes, rates of premiums, expenses of collections, and ratio of assets to liabilities. The plaintiff claimed that certain statements as to its premium rates were erroneous and that the effect was to represent the management of the company as recklessly extravagant, which was alleged to be untrue. A decree denying an injunction was affirmed. Plaintiff here had no cause of action at law. The matter published was the opinion of a critic upon a subject of great public interest, not a maliciously false statement of fact concerning a private individual persisted in after its untruth had been shown, as in *Dixon* v. *Holden*. Hence in its result *Prudential Assurance Co.* v. *Knott* may be reconciled with *Dixon* v. *Holden*. Besides, if there was a libel in the *Prudential Assurance Co.* case, the question of fact was doubtful. It was largely a question of inferences; a question of fair comment on the conduct of plaintiff's business. In other words, it was exactly the sort of case where the policy of the law, if not actual legislation, calls for trial by jury. *Dixon* v. *Holden*, on the other hand, was a perfectly clear case of intentional defamation. Nevertheless Lord Cairns proceeds to argue that *Dixon* v. *Holden* and *Springhead Spinning Co.* v. *Riley* were wrongly decided. He puts a dilemma. If there was not a libel at common law, there was no ground for equity to interfere, for equity has no jurisdiction as censor of publications. This is obviously true. The jurisdiction over torts is concurrent. But, he says, if there was a libel, it is clearly settled that equity will not enjoin a publication merely because it is a libel. This horn of the dilemma is not one that we are bound to take. Suppose in this case the pamphlet had been shown beyond contradiction to be maliciously false. Could it be said that the aid of equity was sought solely because the publication was a libel? No. The argument would run thus: (*a*) There is a libel, a tort; (*b*) it injures property rights; (*c*) the remedy at law is wholly inadequate. What more could be asked in order to give equity jurisdiction? As in the *Diatite* case, so here it is admitted that there are publications which equity will restrain, although they are libelous, if there is some ground of injunction other than libel. In other words, Blackstone's view as to liberty of publication is not tenable as the ground of denying relief and the main argument in *Brandreth* v. *Lance* is put out of the way. The *Prudential Assurance Co.* case seems to have been decided

rightly. But the reasoning of Lord Cairns was singularly undiscriminating and he lost a great opportunity to put the law on a sound basis. Possibly the Lords Justices who concurred meant that the argument in *Dixon* v. *Holden* was susceptible of too broad a construction. But the argument in *Prudential Assurance Co.* v. *Knott* was susceptible of too narrow a construction, and in this country the case has uniformly been taken to mean that there may be no relief in equity against a clearly false and malicious libel which does irreparable injury to property rights.[65]

One American case, containing an elaborate but superficial review of the authorities, deserves notice. In *Marlin Fire Arms Co.* v. *Shields*,[66] plaintiff, a manufacturer of firearms, had been advertising with defendant, the publisher of a well-known and widely taken magazine for sportsmen, but had withdrawn its advertisement. Thereupon defendant, in order to coerce plaintiff to renew its advertising, or, if this did not result, to gratify his spite, wrote sham letters, purporting to be written by correspondents and published as coming from correspondents, in which the pretended correspondents pointed out pretended defects in plaintiff's rifle, criticised it for pretended shortcomings and disparaged it generally. A demurrer was sustained. We must first ask, was there a cause of action at law? Apparently there was not. At common law an action for disparagement of property seems to require three things: (1) Publication of false statements in disparagement of plaintiff's property, (2) malice, (3) proof of special or actual damage in consequence of the publication.[67] The first two requisites were shown. The third was not covered by plaintiff's complaint except by an averment that the publication had caused plaintiff to lose sales "to a

[65] Martin *v.* Wright, 6 Sim. 297 (*semble*); Seeley *v.* Fisher, 11 Sim. 581 (*semble*); Edison *v.* Thomas A. Edison, Jr., Chemical Co., 128 Fed. 957; Montgomery Ward & Co. *v.* Dealers' Ass'n, 150 Fed. 413 (*semble*); Citizens' Light Co. *v.* Montgomery Light Co., 171 Fed. 553; American Malting Co. *v.* Keitel (C. C. A.), 209 Fed. 351; Singer Mfg. Co. *v.* Sewing Machine Co., 49 Ga. 70; Chicago City Ry. Co. *v.* General Electric Co., 74 Ill. App. 465; Allegretti Chocolate Cream Co. *v.* Rubel, 83 Ill. App. 558; Raymond *v.* Russell, 143 Mass. 295; Finnish Temperance Society *v.* Publishing Co., 219 Mass. 28, 106 N. E. 561; Life Ass'n *v.* Boogher, 3 Mo. App. 173; Iverson *v.* Dilno, 44 Mont. 270, 119 Pac. 719; Richter *v.* Journeyman Tailors' Union, 24 Weekly Law Bull. (Ohio) 189; Baltimore Life Ins. Co. *v.* Gleisner, 202 Pa. St. 386, 51 Atl. 1024; Mitchell *v.* Grand Lodge (Tex. Civ. App.), 121 S. W. 178.

[66] 171 N. Y. 384, 64 N. E. 163.

[67] White *v.* Mellin (1895), A. C. 154; Lyne *v.* Nichols, 23 T. L. R. 86; Barrett *v.* Associated Newspapers, 23 T. L. R. 666; Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527.

large extent, but to what extent, plaintiff is unable to state." The court, therefore, assumed that there was no cause of action at law because of inability to show special damage. It might be argued that this would not necessarily be fatal. Why should not the plaintiff be able to maintain the suit by showing that actual damage was threatened for which damages would be no adequate remedy? Why must he wait for actual damage to accrue where all the other elements exist and grave actual damage is so clearly threatened? [68] The court appears to assume too readily that failure to show a money damage now suffered must be fatal even though irreparable special damage is obviously impending.

As no cause of action at law had accrued, if we assume as the court did that threatened special damage would not suffice in such a case in equity, the *Marlin* case might well be decided without considering the general question of injunctions against defamation or disparagement of property. But the court argues that such injunctions cannot be granted in any case, reaching this conclusion on the ground taken in *Brandreth* v. *Lance* and also upon review of the prior decisions.[69] It might well be argued that liberty of publication was not involved, since admittedly the published statements were false and were made for the purpose of coercing the plaintiff and for spite. Nor was the policy of jury trial involved. There was no dispute as to the facts. The letters were admitted to be shams, concocted to injure the plaintiff. There was no more need of a jury

[68] It must be confessed that the English cases have sometimes denied an injunction where no actual damage was proved. Lyne *v.* Nichols, 23 T. L. R. 86. But in the case cited perhaps no actual damage was threatened since the false statements related to the circulation of plaintiff's newspaper, and intending advertisers could inspect plaintiff's books and ascertain the facts, whereas in the Marlin case the experience of hunters with plaintiff's rifle could not be shown to intending purchasers in any such way.

[69] There is nothing said upon the subject of liberty of publication which adds anything to Brandreth *v.* Lance unless it be the suggestion that if such injunctions were allowed, a judicial censorship of the press would result under which one might be punished in a contempt proceeding for publishing an article that was not libelous. There may be a miscarriage of justice in spite of every safeguard. We must inevitably run certain risks in the administration of justice. But if such injunctions are granted only where (1) there is a legal cause of action for defamation or for malicious disparagement of property, (2) there is a case for equity jurisdiction because of the inadequacy of the legal remedy, and (3) there is clearly a libel or a malicious false statement so that there is no substantial call for jury trial, it would seem that review of the decree by an appellate tribunal ought to insure against the evils which the court fears. If not, we may as well revert to the methods of colonial America and cut off all equity jurisdiction for fear of judicial tyranny.

than in a clear case of nuisance or a clear case of disturbance of an easement.

The English courts now grant injunctions freely in these cases. *Prudential Assurance Co.* v. *Knott* had scarcely been decided when the practice arose of allowing an injunction in case the libel was repeated or publication was continued after a jury had found the matter libelous.[70] Presently it came to be held that if the libel was clearly established, an injunction would be granted without requiring the plaintiff to go to a court of law.[71] To-day the English courts will even grant an interlocutory injunction against a libel if it is clearly shown to be one,[72] exactly as in case of any other tort.[73] The books attribute this repudiation of *Prudential Assurance Co.* v. *Knott* to the effect of the Common Law Procedure Act (1854) and the Judicature Act (1873). But those statutes afford very slight foundation for such a result. The former gave the courts of common law in their discretion power to grant injunctions in actions at law in cases where an injunction ought to issue, just as the codes of procedure in this country gave the courts of both legal and equitable jurisdiction power to allow injunctions in the course of legal proceedings.[74] It is reasonably clear that this referred to cases where there ought to be an injunction on the principles of equity jurisdiction. But the argument is that from 1854 to 1873 English courts of law had a wider power of granting injunctions than the court of chancery. They could enjoin parties in their discretion whenever they thought there ought to be an injunction, while the chancellor had no such power until by the Judicature Act it was extended to all the divisions of the High Court.[75] Thus, we are to believe, the Act of 1854 put liberty of the press and all the common-law rights of

[70] Saxby *v.* Easterbrook, 3 C. P. D. 339; Halsey *v.* Brotherhood, 15 Ch. D. 514, 19 Ch. D. 386. See also Flint *v.* Smoke Burner Co., 110 Mo. 492, 19 S. W. 804.

[71] Liverpool Ass'n *v.* Smith, 37 Ch. D. 170; Bonnard *v.* Perryman (1891), 2 Ch. 269.

[72] Collard *v.* Marshall (1892), 1 Ch. 571. For the present practice, see James *v.* James, 13 Eq. 421; Thorley's Cattle Food Co. *v.* Massam, 14 Ch. D. 763; Thomas *v.* Williams, 14 Ch. D. 864; Hermann Loog *v.* Bean, 26 Ch. D. 306; Hayward *v.* Hayward, 34 Ch. D. 198; Walter *v.* Ashton (1902), 2 Ch. 262.

[73] See, for example, Cronin *v.* Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605.

[74] A statute substantially the same as the Common Law Procedure Act on this point was construed not to give a court of law power to do more than a court of equity could have done in the way of preserving the *status quo* pending the action at law. Richmond *v.* Dubuque R. Co., 33 Ia. 422, 476.

[75] Beddow *v.* Beddow, 9 Ch. D. 89; Quartz Hill Consolidated Co. *v.* Beall, 20 Ch. D. 501.

Englishmen into the hands of the judges, so far as injunctions may affect them, subject to no restraint beyond the judicial sense of what justice may demand. If the judges had not been anxious to put equitable relief against defamation on a sound basis, we may be sure they would never have tolerated such arguments. In truth the good sense and sound instinct of the English courts led them to strain a point in order to rid themselves of the doctrine of *Prudential Assurance Co.* v. *Knott.*

American courts have moved more cautiously and less directly. In *Emack* v. *Kane*,[76] a case similar to *Boston Diatite Co.* v. *Florence Mfg. Co.*, except that the bill set forth a very strong case of intimidation of plaintiff's customers by wrongful threats of infringement suits, made with no intention of really suing, the court enjoined wrongful interference with plaintiff's business relations with his customers and thus enjoined the publications by which the interference was effected. This reminds one of *Lane* v. *Newdigate*, and has the same justification, as a way round a prejudice that obstructs the course of justice. If the reasoning is not much better than that by which the English courts evaded *Prudential Assurance Co.* v. *Knott*, it is no worse, and the result is by no means so bold. At first *Emack* v. *Kane* was much criticised. But the need of doing something to prevent such extortion as that involved, for example, in the *Marlin* case, moved one court after another to take the same step until two respectable lines of authority came into existence which justify injunctions against writing and publishing.[77] Some of the cases involve publication as incidental to an unlawful boycott or to unlawful intimidation of employees.[78] Here the order clearly involves "previous restraint" upon publication. It is argued, however, that equity has jurisdiction independently to enjoin the injury of which the publication is but an incident.[79] This position is now

[76] 34 Fed. 46.

[77] See *supra*, note 41.

[78] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, and cases cited on p. 437; Cœur D'Alene Mining Co. *v.* Miner's Union, 51 Fed. 260; Casey *v.* Cincinnati Typographical Union, 45 Fed. 135; Seattle Brewing Co. *v.* Hansen, 144 Fed. 1011; American Federation of Labor *v.* Bucks Stove & Range Co., 33 App. D. C. 83; Beck *v.* Teamsters' Union, 118 Mich. 497, 77 N. W. 13; Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106; McCormick *v.* Local Unions, 32 Ohio Cir. Ct. R. 165.

[79] Thus in Beck *v.* Teamsters' Union, 118 Mich. 497, the court says:

"It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot

taken by the Supreme Court of the United States,[80] which has given up its *dictum* that "in the eyes of the law" damages are an adequate remedy for all publications.[81] Others are substantially like *Emack* v. *Kane*.[82] The most significant are cases of attempt to extort by means of gross libels. For example, in *National Life Ins. Co.* v. *Myers*,[83] the principal defendant was a discharged employee of a life insurance company. He and others conspired to extort money from the company by publishing advertisements in the newspapers and sending pamphlets to policy-holders containing extravagantly false charges, such as, for example, that $1,600,000 of assets had disappeared. An order allowing an interlocutory injunction was affirmed. This goes a long way. But beyond doubt the case was one where nothing in the way of fair comment or criticism was involved and the libel was so indubitable that there was no substantial occasion for jury trial. The interlocutory injunction is justified by

be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties cannot interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning they attached to the word "boycott," and they all evidently understood it as the defendants interpreted it by their conduct and acts. It is true that, under our Constitution, no one can be enjoined from publishing a libel."

If Blackstone's view of liberty of publication is intrenched in the constitution, it is not easy to meet the criticism of this argument in Lindsay & Co. *v.* Montana Federation of Labor, 37 Mont. 264, 276, 96 Pac. 127.

[80] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418.

[81] Francis *v.* Flinn, 118 U. S. 385.

[82] Lewin *v.* Welsbach Light Co., 81 Fed. 904; Farquhar *v.* National Harrow Co., 99 Fed. 160; Adriance, Platt & Co. *v.* National Harrow Co., 121 Fed. 827, 98 Fed. 118; Dittgen *v.* Racine Paper Goods Co., 164 Fed. 85; Electric Renovator Co. *v.* Vacuum Cleaner Co., 189 Fed. 754; Atlas Underwear Co. *v.* Cooper Underwear Co., 210 Fed. 347; Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280.

In the latest and most elaborately argued case, American Malting Co. *v.* Keitel, 209 Fed. 351, an injunction against repeated pamphlets and circulars, accusing plaintiff of being party to an unlawful combination and seeking to divert trade from plaintiff, was denied. The case looks very much like one of malice. Unless the statement could be held to amount to criticism or opinion or the question of truth was doubtful, the result seems unfortunate.

[83] 140 Ill. App. 392.

the same reasons that warrant such an injunction against a palpable nuisance.

Looking back over these cases of injury to person or property by writing and publishing, we see that the English courts now deal with them as with any other torts; that in England the subject has had the very same development as equity jurisdiction over trespass, over disturbance of easements, and over nuisance. We see also that American courts are moving in the same direction, reaching such cases indirectly by laying hold of some admitted head of equity jurisdiction and tacking thereto what is in substance a concurrent jurisdiction over legal injuries through publication. In some of the cases this is so obviously but a matter of pleading that we may be confident some strong court presently will take the direct course and will be followed therein.[84] Most of the cases that grant relief speak strongly of the injustice that must result from denial of jurisdiction in these cases. In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion. So long as denial of relief in such cases rests on no stronger basis than authority our courts are sure to find a way out.

II

Injuries to Personality

In the colloquy in *Gee* v. *Pritchard* Lord Eldon's second proposition was that the suit could not be maintained to protect the feelings of the plaintiff, but only to protect her rights of property. The same proposition was laid down in *Brandreth* v. *Lance*. I have endeavored to show that difficulties involved in injunctions against publication have had much to do with this doctrine in the cases of defamation, in which it has chiefly come in question. But it is asserted no less dogmatically in cases of injury to personality otherwise than by writing or speaking, in which liberty of publication is in no wise involved.

A typical decision, often cited, is *Chappell* v. *Stewart*.[85] In that case, the defendant employed detectives to follow the plaintiff

[84] Compare the vigorous assertion of equity jurisdiction to protect purely personal rights in Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 67 Atl. 97.

[85] 82 Md. 323, 33 Atl. 542.

wherever he went and threatened to continue so to do, causing the plaintiff great inconvenience and annoyance and subjecting him to humiliation. The court sustained a demurrer to a bill for an injunction. There were allegations of injury to business and credit, but no facts showing any such injury were set forth and the case was clearly one of invasion of the right of privacy. The defendant argued that there was no such legal right. But the court refused to pass upon the question whether an action at law would lie, and held, assuming there was a legal cause of action (1) that "the ordinary processes of the law are fully competent to redress all injuries of this character," (2) that by the settled doctrine equity has no jurisdiction to secure purely personal rights. If there was a legal wrong in this case, the legal remedy was an action on the case for damages, and it is a mockery to say that a court which could give no other relief is "fully competent" to redress the wrong. Suppose, for instance, the plaintiff were a clergyman, a man of refined and sensitive feelings, and the defendant was having him "shadowed" notoriously by a detective out of pure spite with no other end than annoyance and humiliation. To say that damages under such circumstances would be an adequate remedy "in the eyes of the law" is to use the term "adequate" in a Pickwickian sense or to attribute to the law unnecessary obliquity of vision. The other point is rested on the *dicta* of Lord Eldon in *Gee* v. *Pritchard* and on the statements of two text writers who repeat those *dicta*. We have seen elsewhere that this is a very slender basis for such a conclusion. The crucial question in such a case as *Chappell* v. *Stewart* is as to the legal right. There is no danger of interference with freedom of publication, and common-law policy as to jury trial is not involved more than in case of any injunction against a threatened tort. It is significant that all but one of the cases in accord with *Chappell* v. *Stewart* deny the legal right.[86]

In one case, however, the legal right was undoubted. *Kneedler* v. *Lane*[87] was a suit for an injunction against enforcement of the draft during the Civil War, on the theory of enjoining threatened assault and false imprisonment under an unconstitutional statute. It appeared that the writ of *habeas corpus* was suspended. The court

[86] Atkinson *v.* John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285; Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442; Kneedler *v.* Lane, 3 Grant Cas. (Pa.) 325. *Cf.* Woollcott *v.* Shubert, 154 N. Y. Supp. 643.

[87] 3 Grant Cas. (Pa.) 325.

divided three to two against the injunction. The main question was one of constitutional law. On the question of equity jurisdiction, Strong, J., said for the majority:

"But when, before these cases, was an injunction ever granted to restrain the commission of a purely personal tort? What chancellor ever asserted he had such power?" [88]

To this not very conclusive argument, Woodward, C. J., replied:

"Courts of equity are accustomed to enjoin to prevent frauds, waste, nuisances, trespasses, obstructions and diversions of water courses, and in numerous other torts. The principle of injunctive relief against a tort is that the inadequacy of the remedy at law is a sufficient equity and will warrant an injunction against the commission or continuance of the wrong. . . . The inadequacy of all remedies at law for infringement of personal liberty, when *habeas corpus* is suspended, is too plain to be doubted or discussed, and the necessary consequence is that courts of chancery would have jurisdiction. . . . If courts of chancery have not jurisdiction of torts which touch liberty, what are we to say, — that property is better guarded with us than liberty? Who is willing to stand on that ground? . . . I would not say that man has more rights in his horse or his house than he has in himself. If equity will restrain torts in respect to lands and goods, much more will it restrain torts in respect to the immensely higher interest — his liberty — when all legal remedies have been taken away." [89]

Although *Kneedler* v. *Lane* turned chiefly upon the constitutional question, these statements are important in that they put each side of the question as well as it has ever been put in the cases. But it should be said that a serious question of policy as to exercise of jurisdiction was involved, which is not present in the ordinary case.

In a note to *Chappell* v. *Stewart*, which has frequently been quoted,[90] the doctrine of that case is vigorously criticised. The editor says that the proposition announced "taken literally and in its full meaning would make the system of equity suitable only to a semi-savage society which has much respect for property but little for life." He adds:

"Our equity jurisprudence does not quite deserve so severe a reproach. It does, indeed, do much for the protection of personal rights, although it has not been willing to acknowledge the fact, but has persisted in declaring the contrary."

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[88] 3 Grant Cas. (Pa.), 524.

[89] *Id.*, 568.

[90] 37 L. R. A. 783, discussed in *Ex parte* Warfield, 40 Tex. Crim. 413, 50 S. W. 933; Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 67 Atl. 97.

To support the latter proposition, the editor puts five classes of cases where, he conceives, equity in truth secures personality, although purporting to secure substance only. These five categories deserve careful examination.

(1) First the editor puts cases of nuisance such as a rifle range, dangerous to life, noise which prevents rest and sleep, and odors or sewage, dangerous to health. It is true that in these cases protection of property does indirectly secure individual interests of personality along with social interests in the general safety and the general health. But in a very real sense the interests secured are interests of substance only. The plaintiff may sue only because he has an estate in the property and is deprived of or injured in his *jus utendi*. If his nerves are steeled, his ears are deaf, or his nose is indifferent, the members of his household, injured only in their personal rights, will suffer in vain.

(2) Next he puts cases of publication in violation of contract or of trust. These cases bear out his point. For the most part the protection of property, on which they purport to proceed, is no more than a fiction. The theory is that the beneficial interest in the trust *res* or the contract right is an asset to be protected. But in reality the substantial interest secured is generally one of personality. If it were not for this, especially in the contract cases, the court would be certain to say that there was no substantial interest in the plaintiff to make it worth while for equity to interfere. The true interest secured is brought into equity, as it were, "parasitic" to a merely nominal interest of substance.

(3) The cases next cited are those involving private letters, which follow *Gee* v. *Pritchard*.[91] Here also the editor's point is well taken. Where, as in the cases referred to, the letters have no literary or historical quality and no value as autographs, the property in them is not much more than a fiction. If it were not for the invasion of privacy involved, we may be sure the chancellor would say that plaintiff's interest was too trivial to justify relief in equity.

(4) He next puts the cases where the chancellor acts for the protection of infants. These cases, however, do not seem to be in point. In them the chancellor, representing the king as *parens patriae*, secures all manner of interests of infants. But he does not act to

[91] *E. g.* Woolsey *v.* Judd, 4 Duer 379.

secure any individual interests of the infants. Rather he acts to secure a general social interest in dependents. Such cases are not at all comparable to ordinary proceedings in equity to vindicate private rights.

(5) Finally he refers to certain recent English cases. An objector might answer that these cases depend upon statutes. And if it be replied that a strained construction was given those statutes to enable equity to act, yet the effect is to secure all interests of personality directly, which is more than the editor contends for as the actual practice.

It is submitted, therefore, that the five classes of cases shrink to two. But the two are highly significant, and a third no less significant may be added, namely, the cases of wrongful expulsion from social clubs where the real wrong complained of is the humiliation and injury to feelings. Here, as we shall see presently, courts of equity generally insist upon some shadow of a property interest, however trivial; actually protecting the feelings, but purporting to protect only the pocketbook. The analogy to what we have seen taking place in the cases as to defamation and disparagement of property is suggestive. In each case the courts protest that the law is unchanged. The old doctrine is announced with conviction. But its whole spirit is rejected and in the result it is evaded. Something is found which gives the camel's nose legitimate standing in the chancellor's tent, and the whole beast follows in order to dispose of the case completely. Such devices never obtain except when we are dealing with a moribund rule.

There are now some American cases which directly or by way of *dictum* authorize the securing of personality through injunction.[92] But most of them turn on the existence and scope of the legal right. The two decisions in Louisiana assume the right of privacy and the remedy by injunction without any discussion of the difficulties involved. The New York case must be regarded as overruled. The rest are *dicta*. Nevertheless the proposition is by no means so burdened with adverse authority as in case of defamation and disparagement of property and involves fewer difficulties. If the right

[92] Corliss *v.* Walker, 57 Fed. 434 (*semble*); Itzkowitz *v.* Whitaker, 115 La. 479, 39 So. 499, 117 La. 708, 42 So. 228; Schulman *v.* Whitaker, 117 La. 704, 42 So. 227; Munden *v.* Harris, 153 Mo. App. 652, 134 S. W. 1076 (*semble*); Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 67 Atl. 97; Marks *v.* Jaffa, 6 Misc. 290, 26 N. Y. Supp. 908; Hodgeman *v.* Olsen, 86 Wash. 615, 150 Pac. 1122.

of privacy succeeds in establishing itself, injunction, as the only effective remedy, is likely also to establish itself for such cases.

It remains to consider a related group of cases in which equitable relief has been sought to protect individual interests in the domestic relations.

In *Hodecker* v. *Stricker*,[93] plaintiff was the wife of H., but defendant was living with him unlawfully as his wife and assumed the name of Mrs. H., appropriating plaintiff's lawful name to the prejudice of plaintiff's standing in the community. Suit was brought to enjoin this use of plaintiff's name and usurpation of plaintiff's rightful social position as H.'s wife. There was no suggestion of injury to property, of any cloud upon title, or of any embarrassment of an inchoate right of dower. Nor did plaintiff seek to vindicate her claims to the society and affection of her husband against interference by defendant. Apparently she did not want the one and had acquiesced in loss of the other. Her case rested, therefore, upon an interest of personality; upon a claim of a right very like privacy. The wrong sought to be enjoined was usurpation of the name to which she was entitled as the lawful wife of H. and the injury consisted in humiliation and injury to feelings and mental comfort caused by this open assumption of her name as well as her place by an adulteress. The main question, accordingly, was whether the law recognizes such a right; whether it secures a wife in a claim not to be humiliated and subjected to gossip and unjust suspicion by another's holding herself out to the world as her husband's lawful wife, thus in substance asserting that the true wife is not what she purports to be, and casting doubt upon her status in a relation in which a woman is peculiarly and properly sensitive. Such a case is quite unlike those where two persons bear the same name and one claims to use it exclusively for business purposes. For a name may be property, as in *Edison* v. *Edison Polyform Co.*,[94] or it may, as in this case, be a part of one's personality. This is recognized in the civil law,[95] and it is not easy to see why our law should not look at the matter in the same way. If so, the remedy at law is so palpa-

[93] 39 N. Y. Supp. 515.

[94] 73 N. J. Eq. 136, 67 Atl. 392.

[95] 1 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 122, 122-4, 122-5; 1 ENNECCERUS, KIPP UND WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, 11 ed., § 93 (9).

bly inadequate that an injunction would seem appropriate.[96] A demurrer was sustained by a court bound by *Roberson* v. *Rochester Folding Box Co.* and *Brandreth* v. *Lance* to deny both the right and the remedy.

Equity jurisdiction to protect an individual interest in a domestic relation was involved in *Ex parte Warfield*.[97] Here the court had enjoined the defendant, who was alleged to have partially alienated the affections of plaintiff's wife and to be threatening and endeavoring to wholly alienate them, from visiting or associating with her, going to or near her at a certain house, or interfering with plaintiff's attempts to communicate with her. The defendant having violated the injunction by meeting and talking with plaintiff's wife and going to the house in question for that purpose, was committed for contempt and brought a *habeas corpus* proceeding, claiming that the injunction was void for want of jurisdiction. As the court had general jurisdiction at law and in equity and the defendant was before it, one might think that at most the order could only be pronounced erroneous and hence the collateral attack must fail. But for historical reasons the equity side of a court possessing both common-law and equity jurisdiction is looked on as if it were a distinct court of equity. Hence we ask in such cases whether the cause is within some class of causes which may be entertained by a court of equity as distinct from a court of law. If not, the injunction is treated as void. If it is in the class of causes of which equity has jurisdiction but on the principles of exercise of that jurisdiction the injunction should not have been granted in the particular case, the order allowing the injunction is merely erroneous.[98] Hence in *Ex parte Warfield* it became necessary to determine whether equity had jurisdiction to protect a purely personal right of the husband to the society and affection of his wife. The court held that it had such jurisdiction, since there was a legal cause of action for alienation of the wife's affections and the legal remedy was inadequate.[99]

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[96] See the remarks of Dill, J., in Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 920–21, 67 Atl. 97.

[97] 40 Tex. Crim. 413, 50 S. W. 933.

[98] *In re* Sawyer, 124 U. S. 200.

[99] If the order had been appealed from, there might have been a serious question as to the expediency of exercising the jurisdiction. The chancellor would have to consider whether he could reasonably expect to accomplish anything by such an injunction; to consider whether a situation where the defendant was in jail because he persisted

Two circumstances, however, detract somewhat from the weight of *Ex parte Warfield* as an authority. There was a statute in Texas [100] which the courts of that state construe as giving a wider power of granting injunctions than that possessed by courts under the general equity doctrine. Also it might be urged that at common law the husband has a legal right to the services of the wife which is to be regarded as a property right and hence that equitable relief may be invoked to secure that right and may be employed incidentally to secure the more significant interests of a purely personal nature. Thus the case could be brought within the analogy of *Gee* v. *Pritchard*. But it is significant that the property right of the husband in the wife's services, now thoroughly moribund for all substantial purposes, should acquire a temporary vitality to enable the courts to secure interests of personality which they hesitate to protect avowedly as such.

Still another type of personal right was involved in *Vanderbilt* v. *Mitchell*.[101] In that case the plaintiff's wife, who was living in adultery with a third person, fraudulently procured a physician to insert in a birth certificate, provided for by the laws of New Jersey, that the plaintiff was the father of a child born to her in adultery. The certificate was recorded, and under the terms of the statute a certified copy might be used as *primâ facie* evidence of the facts therein set forth. Suit was brought for cancellation of the fraudulent birth certificate and the record thereof and to enjoin the mother and the child from claiming for the child the status, name, or property of a lawfully begotten child of the plaintiff. The vice chancellor denied an injunction on the ground that the case did not come under any recognized head of equity jurisdiction, that no property rights were involved, and that equity was not competent to protect rights

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in seeing her would not be likely to fan the wife's erring affection for defendant, and to consider that he could not keep the wife away from the defendant even if he could keep the defendant away from the wife. But these considerations are not relevant to the question of jurisdiction.

[100] Article 2989, REV. STAT., providing that judges might grant injunctions in three cases. The first was, "When it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the applicant." The third was, "All other cases where the applicant for said writ may show himself entitled thereto under the principles of equity." See Sumner *v.* Crawford, 91 Tex. 129, 41 S. W. 994.

[101] 72 N. J. Eq. 910, 67 Atl. 97.

which were purely personal.[102] This decree was reversed and the demurrer was overruled in the Court of Errors and Appeals by the unanimous judgment of fourteen judges.

The bill in *Vanderbilt* v. *Mitchell* showed that plaintiff had a vested remainder in an undivided share of certain lands under his mother's will, dependent upon the number of her descendants at the date of distribution. The interest was alienable and hence the certificate constituted a cloud upon the title which equity had jurisdiction to remove. The court holds this sufficient to justify the suit. But another right was also involved. The plaintiff was confronted with a false and fraudulent public record witnessing that a bastard, born in adultery, was his lawful child. This was such an unwarranted usurpation of his name and of the status and position of being his son as to be an infringement of his personality. The case might, therefore, be based upon an interest of personality analogous to the one involved in *Hodecker* v. *Stricker*, and the court was quite willing to rest its action upon this right, if necessary, and to hold that equity had jurisdiction to secure a purely personal right of that sort. Dill, J. said:

"If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion, and we should declare that the complainant was entitled to relief." [103]

But, he says, "the *technical basis* of the jurisdiction . . . is the protection of property rights." Conceding so much, he adds:

"The equitable character of the action itself requires us to regard comparatively remote and trifling interferences with such property rights in the light of the great and immediate interference with the personal rights of the complainant, although as we have already stated, whether this bill might not be rested on such personal basis alone, without reference to the technical protection of property, is not now decided, because the present case does present the property feature to an extent sufficient to satisfy even the rule adopted by the court below." [104]

This is *Gee* v. *Pritchard* over again. But it is *Gee* v. *Pritchard* used in the right way to advance the ends of law by an intelligent use of the actual decision in that case, not, as has happened too often, to

[102] 71 N. J. Eq. 632, 63 Atl. 1107.

[103] 72 N. J. Eq. 910, 919.

[104] *Id.*, 926.

defeat the ends of law by looking only to the letter of Lord Eldon's *dicta*. Moreover the remarks of the court on the subject of equitable protection of interests of personality [105] are admirable and will undoubtedly exert a wholesome influence.

III

Protection of Social and Political Relations

The same questions are presented in another form in cases of wrongful expulsion from social clubs or interference with the exercise of political rights. Suppose, for example, a member is wrongfully expelled from a trade union and sues to enjoin the governing authorities from excluding him. What right does he seek to secure? It may be that the union owns funds or property and (supposing it to be unincorporated) he may be co-owner or co-beneficiary and so be excluded unlawfully from his share in the property. Or it may be that he can obtain work or can exercise his trade or calling only provided he is in good standing in the union, so that if he is wrongfully expelled, the practical effect is to exclude him from exercising the trade on which he depends for a livelihood. It is not easy to differentiate such a case from the injury to the credit and financial standing of a business man, *e. g.*, in *Dixon* v. *Holden*. Power to work is the chief asset of the laborer as credit is the chief asset of the business man. Again it may be that the club or association is merely social and that no share in any property and no added power of pursuing one's vocation is involved in belonging thereto. In that event, if one is wrongfully expelled, there is a humiliation, an indignity, akin to violation of privacy and akin to defamation. Expulsion from a club may, indeed, be the highest form of injury without involving any interest of substance in the least.

According to the prevailing doctrine in the authorities, there is a remedy only in the first case.[106] In case the club or association has funds or property, even if plaintiff's interest in the common property from which he is excluded is as insignificant as the "little diachylon"

[105] 72 N. J. Eq., 919, 921–23, 924–25.

[106] In Rigby *v.* Connol, 14 Ch. D. 482, Jessel, M. R., says:

"I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property." See Mesisco *v.* Giuliana,

for which Lord Holt was willing to award damages, equity will interfere — nominally to protect the property right, but in truth and in substance to protect the interest in personality against wrongful and malicious injury. This is the same doctrine that we have seen in *Gee* v. *Pritchard* and *Vanderbilt* v. *Mitchell*. But in cases where there is no property we are told that equity will not interfere, although in the second of the three cases put there may be a very serious economic injury and in the third case a very serious injury to personality.

It is worth while to note how this conclusion is justified. Sir George Jessel tells us that in case of a voluntary association of individuals without property the court cannot compel persons to associate together if they do not so desire; that a court can assure to a plaintiff participation in the use of property but it cannot secure him in purely social relations. Accordingly Sir George Jessel compares the case to a contract of personal service, where the court cannot coerce the promised personal performance. In other words, plaintiff may have the right, but there is a practical difficulty in enforcing it and so, in so far as it can act at all, equity turns to the indirect method of enforcing some property right, in order to furnish a "technical basis of jurisdiction," just as in the personal service cases relief that in effect coerces performance of the affirmative is tacked to jurisdiction to enforce a negative. Undoubtedly there is much force in the point as to the difficulty of enforcing the rights of a member threatened with wrongful expulsion from an unincorporated association. But these and other difficulties vanish when the "technical basis" of a scintilla of common property is afforded. For there is a real danger that, in exercising the jurisdiction where property is involved, the courts may come to sit on appeal from the committees and meetings of clubs and review their action as they review the acts of inferior judicial or administra-

190 Mass. 352, 76 N. E. 907; Froelich *v.* Musicians' Mut. Ben. Co., 93 Mo. App. 383; Allee *v.* James, 68 Misc. 141, 123 N. Y. Supp. 581; Smith *v.* Hollis, 33 Weekly Notes Cas. (Pa.) 485; Robertson *v.* Walker, 62 Tenn. 316; Gaines *v.* Farmer, 55 Tex. Civ. App. 601, 119 S. W. 874. That the interest is really one of personality is shown by the remarks of Jessel, M. R., in Fisher *v.* Keane, 11 Ch. D. 353: "The character and prospects in life of any member of this club may be irremediably blasted — for that is the result — by the decision of any three casual members of the committee who happen to walk in on a week-day, having no notice of what is about to be brought before them, but merely with the intention probably of auditing the cook's accounts, or attending to some equally trivial matter."

tive tribunals.[107] Moreover there is no insuperable obstacle to effective securing of a plaintiff's right not to be injured wilfully in his sensibilities by a wrongful expulsion from a club that owns no property. It is not necessary to order the defendants to associate with the plaintiff. If they desire to abandon or to dissolve the club, they may be left free to do so. But they might be enjoined from wrongfully and maliciously excluding the plaintiff so long as they keep it up.[108]

Courts are by no means unconscious of what they are really protecting in these cases of wrongful expulsion. This is shown strikingly in *Baird* v. *Wells*.[109] In that case the club had no property whatever, and there was no possibility of resting relief to plaintiff, who had been wrongfully expelled, upon any "technical basis" of injury to property rights. Accordingly the court denied an injunction on the ground that the injury was solely to personality and hence was not cognizable in equity. But while the court professed to deny all relief and to leave the pure interest of personality unsecured, in reality it took a very ingenious way of securing the interest. Knowing all the while that under the doctrine it announces the court was without jurisdiction, it found means to evade the difficulty by first examining whether plaintiff was rightfully expelled. Then, when it had found that he was wrongfully expelled and had vindicated his character by its finding, it went on to show that no relief could be given to him. In other words, plaintiff was given the very thing he really wanted although it was solemnly explained to him that the court had no jurisdiction and could do nothing to help him.[110]

[107] See the remarks of Brett, L. J., in Dawkins *v.* Antrobus, 17 Ch. D. 615. This is especially manifest in the English decisions which review the rules of an association with reference to the demands of "natural justice." *Cf.* Harris *v.* Aiken, 76 Kan. 516, 92 Pac. 537 (*semble*); Loubat *v.* Leroy, 40 Hun (N. Y.) 546; People *v.* Hoboken Turtle Club, 60 Hun (N. Y.) 576; People *v.* Uptown Ass'n, 9 App. Div. 191, 41 N. Y. Supp. 154; People *v.* Independent Dock Builders' Benevolent Union, 164 App. Div. 267, 149 N. Y. Supp. 771 (*semble*); Williamson *v.* Randolph, 48 Misc. 96, 96 N. Y. Supp. 644; Bachman *v.* Harrington, 52 Misc. 26, 102 N. Y. Supp. 406; Grassi Bros. Co. *v.* O'Rourke, 89 Misc. 234, 153 N. Y. Supp. 493; Metropolitan Base Ball Ass'n *v.* Simmons, 17 Phila. 419.

[108] *Cf.* the decree in Hood *v.* Northeastern R. Co., L. R. 8 Eq. 666.

[109] 44 Ch. D. 661.

[110] The plaintiff having appealed from the order denying an injunction, the following proceeding took place in the Court of Appeal:

"1890. April 23. Sir *Horace Davey*, Q. C. (Sir *C. Russell*, Q. C., and *Ernest de Witt*, with him), appeared for the appellant, and stated that, as the judgment of Mr. Jus-

Some American courts have secured the rights of the member threatened with wrongful expulsion from his club by resorting to a theory of contract.[111] The doctrine of these courts is that the constitution and rules of a voluntary association constitute a contract between the members and that equity may enjoin any injurious breach of the contract such as expulsion contrary to the rules. As the courts of New York are committed to the doctrine that equity will not secure personality as such, but only property, it is a convenient mode of evading the difficulty to hold that the "contract of membership" is an asset which may be protected in equity. This enables relief to be given in a case like *Baird* v. *Wells*, where the club has no property and yet there is a serious injury to personality. But the theory is open to serious objection, apart from the questionable use of the idea of contract which it involves. If the basis of relief is breach of contract and the constitution and rules of the club or association are the contract, any breach of the rules that injures the plaintiff seriously may be enjoined and so the courts may be called on to enforce the rights of members of fraternal orders where, if we look at the real interest involved and weigh the difficulties we must feel that relief should be denied.[112] Again, if the basis of relief is breach of contract and the constitution and rules of a voluntary association give the terms of the "contract of membership,"the interpretation of the written contract is for the court. Thus a court of equity is to be the final interpreter of the laws and rules of all voluntary associations, clubs, and fraternal orders. This

tice.*Stirling* had been in favour of the Plaintiff as regarded the irregularity of the proceedings of the Defendants, the Plaintiff had no wish to continue in the club, and would now assent to an order dismissing the appeal with costs."

"Order made accordingly."

In other words, the plaintiff appealed simply for the opportunity of saying publicly that the lower court had given him the substance of a victory although depriving him of the form.

[111] Krause *v.* Sander, 66 Misc. 601, 122 N. Y. Supp. 54; Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763.

[112] For example, in such a case as Wellenvoss *v.* Grand Lodge, 103 Ky. 415, 45 S. W. 360, where plaintiff sought an injunction against wrongfully excluding him from participation in the proceedings of the Grand Lodge, the real injury was to his dignity, to his pride, and his feelings. The chancellor might well ask, is this injury serious enough to warrant the extraordinary interposition of equity? Is it serious enough to warrant the expense and the consumption of public time involved in a judicial proceeding? Is it serious enough to balance the practical difficulty involved in the court's endeavor to learn, interpret, and apply the laws and customs of a fraternal order? See Hershiser *v.* Williams, 6 Ohio Cir. Ct. R. 147.

is neither intrinsically desirable nor expedient from the standpoint of dispatch of public business in the courts.[113] The advantage of the contract doctrine is that it enables the courts to deal more straightforwardly with such cases as *Baird* v. *Wells*. But the same result may be attained in a better way by recognizing that we are protecting interests of personality and by treating the cases on the ordinary principles of the concurrent jurisdiction.

It remains to notice a line of cases in which equitable relief has been sought against wrongful denial of political rights.[114] In these cases there was no tort, and hence there was no question of concurrent jurisdiction. But they repeat the *dictum* in *Gee* v. *Pritchard* and also assert that only civil, as distinguished from political, rights are taken into account in equity. If there is a tort, as in *Ashby* v. *White*,[115] it is because there is a civil right, cognizable in courts of justice, and the circumstance that it is a civil right to exercise one's faculties politically cannot change the situation. The real difficulties are (1) that the injury is usually to feelings, sensibilities, and dignity, and (2) that a court of equity is practically embarrassed in administering a remedy by the danger of undertaking an impossible task.[116]

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[113] The California court which was the first to announce this contract doctrine deals with the point rather ingeniously. It says that only procedural rules are to be inquired into; that is, the constitution or rules providing the machinery of investigation and expulsion are part of the contract, but it is a part of the contract that the member will abide the determination of the tribunal of the organization as to interpretation of the constitution and rules. In other words, the contract provides that these third parties shall fix the interpretation of the terms of the contract in a binding way. Hence it is said all the court can try is, first, whether investigation or trial has taken place in the appointed way or by the appointed tribunal, and, second, whether the interpretation has been made and applied in good faith. Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763. This is very like the English doctrine that there must be no interpretation on the part of the tribunal of the association which makes the rule or proceeding contrary to natural justice. This proposition, however, has interesting possibilities. Suppose one is a member of a religious association and by the discipline of the association a prophet, or bishop, or spiritual head has power to excommunicate on the basis of revelations from on high. Review of an excommunication as contrary to natural justice under such circumstances might involve delicate questions.

[114] Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683; Kearns *v.* Howley, 188 Pa. 116, 41 Atl. 273; Giles *v.* Harris, 189 U. S. 475; Green *v.* Mills, 69 Fed. 852; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494; Winnett *v.* Adams, 71 Neb. 817, 99 N. W. 681. That no tort is involved in such cases as Fletcher *v.* Tuttle, see 2 COOLEY, TORTS, 3 ed. 626 *ff.*

[115] 2 Ld. Raym. 938, 950.

[116] This is well put in Winnett *v.* Adams, 71 Neb. 817, 825, 99 N. W. 681: "We do not overlook the fact that primary elections have become the subject of legislative regu-

The subject of equitable relief against defamation and injuries to personality is beset with inherent difficulties quite apart from those raised unnecessarily by the current of *dictum* since *Gee* v. *Pritchard*. Relief against defamation involves the limits of freedom of publication and the policy of trial by jury in cases of libel. Relief against injury to privacy and related wrongs involves unsettled questions as to the existence and scope of the legal right. Many of the difficulties growing out of the need of balancing conflicting interests and the practical limitations upon securing interests of personality through legal machinery, which make the law cautious and bring about a back-handed protection of personality by "parasitic damages," [117] operate to produce a similar halting and oblique course in equity. Equitable protection of personality against injuries to social and political relations involves danger of undue meddling with the internal concerns of social, political, and religious organizations. But we have proceeded long enough upon fictions and "technical bases" of jurisdiction. A century of judicial experience since the cautious *dicta* and bold action of Lord Eldon in *Gee* v. *Pritchard* has taught us much. More is to be gained by perceiving critically the interests to be secured and the conflicting interests to be balanced against them, by looking the difficulties squarely in the face and by determining what may be done to secure and protect individual personality in view of the difficulties, than by continued lip service to a doctrine laid down only to be evaded.

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lation, and it may be conceded that each member of a political party has a right to a voice in such primaries, and to seek nomination for public office at the hands of his party. But when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbitrator between contesting delegations in political conventions. The voters themselves are competent to deal with such matters without the guiding hand of the chancellor, and it will make for their independence, self reliance and ability for self-government, to permit them to do so. It is true, they may make mistakes, but courts themselves have been known to err."

[117] See my paper, Interests of Personality, 28 HARV. L. REV. 343, 359 *ff.*, 454 *ff.*